Supreme Court, U. S.
FILED
JUL 10 1975
MICHAEL RODAK, JR., CLERK

No. 74-1441

In the Supreme Court of the United States

OCTOBER TERM, 1975

CONTRA COSTA COUNTY WATER DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, a public utility providing water service to designated areas in the State of California, contends that the value of certain real property owned by it in Port Chicago, California, was destroyed by acquisitions of the federal government in that area and that such acquisitions constituted a taking of its property for which it is entitled to just compensation.

Beginning in 1968, the United States acquired, by condemnation and purchase, an area comprising Port Chicago, California, for use in connection with the United States Naval Weapons Station at Concord, California (Pet. 4). The estate taken involved fee simple title subject to "easements for public utilities * * *, existing rights of way in favor of the public or third persons for * * * gas and water pipe lines, and canals, laterals, ditches, flumes and siphons." *United States* v. *40.60 Acres of Ld., Co. of Contra Costa Cal.*, 324 F. Supp. 573 (N.D. Cal.).

Petitioner owned and operated a network of pipes, valves, meters and appurtenant facilities within or adjacent to Port Chicago. These facilities had been used by petitioner in distributing potable water to the residents of Port Chicago. Since acquiring the area, the United States has prohibited human habitation therein and has removed all building and surface structures from the land. The land is presently used as a safety zone to minimize the risk of property damage and personal injury in the event of an accidental explosion at the Naval Weapons Station at Concord. This use does not require a water supply or in any way require the use of the real property owned by petitioner in Port Chicago (Pet. 3-4).

Petitioner sought to intervene as a defendant in the condemnation proceedings, contending that the value and usefulness of its property was being destroyed by the federal government's acquisitions in Port Chicago. The district court held that the United States had not taken petitioner's property in Port Chicago and that the only losses suffered by petitioner were noncompensable business losses arising from the condemnation of real property owned by other persons—that is, petitioner's former customers. *United States* v. *40.60 Acres of Ld., Co. of Contra Costa, Cal., supra.* On appeal, the court of appeals declined to reach the merits of petitioner's complaint, holding that since petitioner's property was not included in the property condemned by the United States, the district court did not have jurisdiction over petitioner's claim. *United States* v. *40.60 Acres of Land, etc., California,* 483 F. 2d 927 (C.A. 9).

Petitioner then filed the present suit in the Court of Claims seeking, among other things, an amount equal to the fair market value of its property, which it contended had been taken by the United States. The United States and petitioner filed cross-motions for summary judgment, and the Court of Claims, relying upon its decision in *Southern Counties Gas Co. of Cal.* v. *United States,* 157 F. Supp. 934, certiorari denied, 358 U.S. 815, granted the motion for summary judgment filed by the United States and dismissed petitioner's petition (Pet. App. A).

The decision below is correct and the questions raised by petitioner do not warrant further review.

1. When the United States takes private property for public use, the Fifth Amendment requires payment only for the taking of vested property rights, not for opportunities that the owner may lose. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378; *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281-283; *Mullen Benevolent Corp.* v. *United States,* 290 U.S. 89, 94-95; *Mitchell* v. *United States,* 267 U.S. 341; *Joslin Mfg. Co.* v. *Providence,* 262 U.S. 668, 675-676; *Omnia Commercial Co.* v. *United States,* 261 U.S. 502, 513. This principle has been uniformly held to apply to utility company losses of the type involved here, and to defeat claims that a taking of property—requiring the payment of just compensation under the Fifth Amendment—has occurred.

In *Southern Counties Gas Co. of Cal.* v. *United States, supra,* for example, the plaintiff was a public utility supplying gas to domestic and commercial users in Southern California. The United States acquired fee simple title to certain lands in plaintiff's service area, subject to existing easements for public utilities and pipelines. Human

habitation on the acquired lands was subsequently prohibited, and almost all existing structures were removed. As a result, plaintiff lost approximately 387 customers and abandoned its facilities in the acquired areas. The Court of Claims held that no compensable interest had been taken by the United States and dismissed the petition. In its opinion, the court stated (157 F. Supp. at 935):

> As we have seen, the properties for which compensation is sought under the Fifth Amendment were not in terms taken by the United States. They were excepted from the declarations of taking and from the condemnation complaint. Use of the properties was brought to an end by the acquisition by the United States of the land of residential and industrial customers of plaintiff, followed by demolition or removal of improvements which had been serviced by plaintiff.
>
> We think this was not, within the compensation provisions of the Fifth Amendment, a taking of the properties for which compensation is sought by plaintiff. Plaintiff's loss is due to the project, but in law is a consequential and noncompensable loss.

Similarly, in *Kellettville Gas Co.* v. *United States*, 56 F. Supp. 919 (W.D. Pa.), the federal government acquired all of the property, except the gas company's mains and easements, within an area to be flooded by a reservoir and removed or destroyed all of the buildings located in the area. The gas company contended that the consequent depreciation in value of its property and franchise constituted a taking under the Fifth Amendment for which it was entitled to just compensation. In rejecting this contention, the court stated (56 F. Supp. at 922):

> The loss of The Kellettville Gas Company was a loss of customers which is a business loss. If a merchant in Kellettville, with an established good will and business, lost all of his customers from the same cause, he would not be entitled to recover from the United States the amount of his business loss. The same would be true of the loss sustained by a physician or a lawyer with an established clientele. If a private individual acquired the same property in Kellettville as the United States did and razed the buildings thereon, he would not be required to compensate the company for its loss. The United States is in the same position.

See also *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (C.A. 6); *United States* v. *677.50 Acres of Land in Marion County, Kan.*, 420 F.2d 1136 (C.A. 10) certiorari denied, 398 U.S. 928; *Hooten* v. *United States*, 405 F.2d 1167 (C.A. 5); *Stipe* v. *United States*, 337 F.2d 818 (C.A. 10); *United States* v. *Honolulu Planation Co.*, 182 F.2d 172 (C.A. 9), certiorari denied, 340 U.S. 820.

By expressly disavowing any claim for "losses of customer revenue or other business losses * * *" (Pet App. D, p. xiii; see also Pet. 4), petitioner has conceded that the Fifth Amendment does not require compensation for business losses. It attempts to avoid the significance of this concession, however, by claiming that it is entitled to compensation for property (that is, pipes, valves, meters and appurtenant facilities) owned by it within the area acquired by the government. Its claim, in essence, is that since it has been deprived of the beneficial use of, if not title to, its property within the affected area, it is entitled to be compensated in an amount equal to the property's fair market value (*e.g.*, Pet. 7).

This claim was also made in the *Southern Counties* case, and was properly rejected by the court as simply an alternative formulation of a claim for compensation for business losses (157 F. Supp. at 936):

> As to the underground pipes we note initially that we are not concerned now with value * * * . * * * We do not reach value unless the pipes have been taken, which we think is not the case. For the loss here too is due to the taking of the property of others, that is, of plaintiff's customers. [Citations omitted.]

Petitioner likewise cannot avoid the fact that its only losses have arisen from the taking of its customers' property. Petitioner's property has not been taken; its easements have not been disturbed and the pipes, valves, meters and appurtenant facilities that it owns in the area of the government's acquisitions remain in its possession and within its control. As the district court noted in *United States* v. *40.60 Acres, supra*, 324 F. Supp. at 575:

> If the military were to move out of Port Chicago tomorrow, the easement rights of the Water District would be as useful as ever. They have only been rendered valueless by the moving away of the Water District's customers—which was an indirect effect of the government's exercise of dominion and control over the fee, not the Water District's pipes, mains and appurtenances.

2. The cases cited by petitioner do not support a contrary conclusion. In each of those cases, which are described in the margin,[1] the claim for compensation rested upon either an actual physical intrusion over (*Causby, Griggs, Portsmouth Co., Dugan)* or upon (*Dickinson, Cress, Welch)* the claimant's property or the destruction of some other vested property interest (*General Motors Corp., Armstrong, Adaman).*

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[1]The case most heavily relied upon by petitioner, *United States* v. *Causby*, 328 U.S. 256, involved the exercise by the federal government of direct dominion and control over respondent's property through continuous, low-level flights above the property. *Griggs* v. *Allegheny County*, 369 U.S. 84, also involved low-altitude overflights. In *Portsmouth Co.* v. *United States*, 260 U.S. 327, petitioner claimed that the federal government had taken its property by repeatedly firing coast artillery over it. *Dugan* v. *Rank*, 372 U.S. 609, involved the partial taking of water rights by the federal government—an action which this Court analogized to the partial taking of air space over land, citing the *Causby*, *Griggs* and *Portsmouth Co.* cases.

The claim made by the respondent in *United States* v. *Dickinson*, 331 U.S. 745, was that the federal government had taken his property because it was periodically flooded by the impoundment behind a federal dam. *United States* v. *Cress*, 243 U.S. 316, involved similar periodic flooding of the claimant's property as a result of the construction by the government of dams and locks designed to improve the navigability of a river. In *United States* v. *Welch*, 217 U.S. 333, the easement owned by the claimant was permanently flooded by the impoundment behind a federal dam so that the claimant was left without any practical access to county roads.

In *United States* v. *General Motors Corp.*, 323 U.S. 373, the federal government took the unexpired portion of a long-term lease and evicted the leaseholder. *Armstrong* v. *United States*, 364 U.S. 40, involved the destruction of a materialman's lien as a result of the government's taking title to the ship against which the lien ran. Finally, in *Adaman Mutual Water Co.* v. *United States*, 278 F. 2d 842 (C.A. 9), the federal government took land in an irrigation project subject to an equitable servitude requiring the landowner to pay the claimant an amount proportional to the number of acres of land under cultivation.

Petitioner concedes by implication that there has been no physical intrusion in the present case of a type that would support a constitutional claim for compensation. As noted above, its argument instead is that it has a vested interest in the beneficial use of the property owned by it in the area of the government's acquisitions and that this vested interest is compensable under the Fifth Amendment (*e.g.*, Pet. 14-15). But petitioner has never suggested that if the private landowners in the present case had discontinued using its services they would have become liable to it in damages. Compare *General Motors, Armstrong* and *Adaman*. Consequently, the facts that the property of petitioner's former customers is now owned by the United States and that the United States has discontinued using petitioner's services do not create a Fifth Amendment right to damages.

3. Neither is petitioner entitled to compensation by virtue of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 1905. Section 302(a) of that Act, 42 U.S.C. 4652(a), directs the head of any federal agency acquiring an interest in real property to acquire "at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put." But the Act does not apply to property acquired by the federal government prior to January 2, 1971, and the government's acquisition of Port Chicago occurred in 1968. The laws in effect at the time of the acquisitions at issue in this case did not authorize compensation for petitioner's property.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1975.